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No. 83-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FYKE FARMER,
Petitioner-Appellant,

VS.

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE,
Respondent-Appellee

BRIEF OF APPELLANT FYKE FARMER OPPOSING MOTION TO DISMISS OR AFFIRM

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The ground for this appeal is that the judgment of the Supreme Court of Tennessee was against a right claimed under the Constitution of the United States, i.e. the right to reputation. The question as to the legitimacy and constitutionality of the state supreme court was not raised in appellant's jurisdictional statement. It is not expected that this Court will consider such claim under its Rule 15, Notes to Decision.

The right to reputation is vouchsafed to him by the Tennessee Constitution Article I, Sec. 17 and by the decision of the Tennessee Supreme Court in *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 in which the court said:

> The enjoyment of private reputation unassailed is a right entitled to the protection of the law and of the Constitution as much as are the rights to the possession of life, liberty, or property. McGhee v. Baumgartner, 121 Mich. 287, 80 N.W. 21; Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936, 3 L.R.A. 532, 12 Am.St.Rep. 707; Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 66 L.R.A. 648.

It is well settled by the decisions of this Court that the right falls within the range of interests protected by the Fourteenth Amendment. *Hewitt v. Helms*, 103 S.Ct. 864 (February 22, 1983); *Meachum v. Fano*, 427 U.S. 215; *Paul v. Davis*, 424 U.S. 693.

Besides, the Motion of Respondent-Appellee admits that Appellant is an attorney licensed to practice before the Supreme Court. Appellant alleged in his statement of the case that he has been a duly licensed member of the Tennessee bar since 1925.

An act passed by the Tennessee legislature in 1868 provided among other things that "all lawyers who set themselves as practicing attorneys, and who shall have been practicing the profession for five years, shall respectively pay a privilege tax of fifteen dollars" and shall obtain an annual license from the Clerk of the County Court to whom the tax shall be paid. A majority of the Supreme Court, then composed of six Justices, held that the statute was invalid. *Lawyers' Tax Cases*, 8 Heisk. 565. Nicholson, C. J., delivered an opinion citing the decision of the U. S. Supreme Court in *ex parte Garland*, 4 Wall, 378, saying:

> "At the time the act of the Legislature in question was passed, the defendant was a practicing lawyer, admitted and enrolled as such by the order of the presiding judge, and therefore entitled to exercise the right or privilege of such officer of the court. Upon the authority just referred to, his right as such attorney and officer could not be

revoked by the Legislature, nor by the court except for professional misconduct. It follows that so much of the act as assumes the power to prohibit the right of practicing law by the defendant without procuring a new license, was unconstitutional and void."

But, said the Chief Justice, that did not settle the question as to the power of the legislature to impose a tax upon the privilege of practicing law. It only established, that as the privilege already existed, it was of a character not to be revoked by the Legislature. It could not be prohibited for the mere purpose of taxing it as a privilege. If, however, it was a privilege under the Constitution, the tax might be imposed without such prohibition by a law for that purpose. To the objection that the law imposed the tax for the *new* privilege created for that purpose, and not on the existing privilege, he answered by referring to the constitutional provision that "all courts shall be open" and that "in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel". (636) He then said that it was difficult to see how the Legislature could impose a tax upon the office or right of the lawyer, without involving the "very existence of the judicial department". He said that if the power exists at all, it may be exercised at the discretion of the Legislature, "by the express language of the Constitution." Hence, although the tax imposed by the statute, might not be so oppressive as to interfere practically with the successful working of the courts, yet if the power be conceded, it is conceding that the Legislature possess a power, which may be exercised, even to the closing of the courts". (p. 637)

The Chief Justice further said that the instituting of suits is not a privilege merely, but it is an absolute right which is common to all citizens, "it is a species of property as held by this Court in the case of Harrison & Pepper v. Willis, 7 Heisk. 44".

Justice Freeman in a concurring opinion said:

> But to recur to the case of a franchise granted as law, suppose the State should assume to revoke the grant and require that every corporation should re-purchase (644) its franchise by obtaining a license for the privilege, or that every grantee of land from the State, should obtain a new grant annually from the State in order to the enjoyment of his lands, and impose a penalty for the exercise of the franchise in the one case, or the beneficial use of the land in the other, would any man hold that this was not a violation of the Constitution of the United States? This would certainly be to impair the obligation of the contract in both cases, as well settled principles, in fact, would be to destroy the contract, and arbitrarily make a new one. This, we think, is precisely the case before us. The Legislature by general law authorized the grant of a license to practice the profession of the law in all the courts of law and equity in the State, to parties who might fit themselves for it by proper professional learning, and give the evidence of good moral character, as required by our statutes. The attainment of proper qualifications and proficiency in the learning of the law, as contemplated by our law, is a work of time and toil. This time might be otherwise profitably employed in other pursuits. The young aspirant foregoes other advantages and with more or less expense he gives himself to the acquirement of the required qualifications. He satisfies the proper authority of his learning, complies with the terms prescribed by the Legislature, and thereupon the State grants him the right to the exercise of his professional skill and use of his professional knowledge. This is henceforward by authority of the State, to be his vocation or calling—the means of his livelihood, (645) he fondly hopes perhaps of great emoluments, and it may be of high position and honor. He has fairly earned his right to the grant of this privilege, and the State has through her authorized officers admitted the fact, and conferred it

upon him by a grant of license as an attorney and counsellor at law. Can he be deprived of this valuable right except for misconduct? We hold not, unless the State can not be bound by her grants, but has the right to assume them at her pleasure; not unless the State is not bound by the obligation of a contract (for this has all the elements of one, we believe, more than the celebrated case of Woodward v. Dartmouth College), and may disregard hers at her pleasure, and impose another: may prohibit the enjoyment of contracted rights granted by penalties that forbid their exercise. This can not be done in our opinion while the Constitution remains that forbids any "State from impairing the obligation of a contract." If the act now under consideration does not impair the obligation of the contract found on the face of every lawyer's license obtained before its enactment, then we are at a loss to see what could do it. The right granted by the State is revoked and is as effectually destroyed as if the Legislature should say, that any man who had been practicing law for five years, should no longer enjoy that right, or exercise the privilege granted by his license. In fact, under this act, the lawyer included in its provisions would henceforward not practice his profession by virtue of his original license, but under the license granted by the County Court Clerk of the (646) State. If he seeks to enjoy his right under the license granted by the judges who have signed it, and under which he formerly exercised the privilege, he is forbidden to do so, and must annually obtain a license from the County Court Clerk, or his law license is so much waste paper to him. We do not think such power can be exercised by the Legislature, and therefore the act is to be held void, as unauthorized by the Constitution of the United States and of our own State.

The argument based on the idea that this is a tax on a lawyer's privilege like that imposed on the merchant, we think overlooks one important and essential element of

difference in the two cases. In the case of the merchant's tax, it is paid on granting the privilege and is the consideration for the license given him. In the case before us, a license has been granted upon good and sufficient consideration in accordance with law. The question in the case of the lawyer is, whether after having obtained the grant, he can be again called on to be re-licensed, and required to pay again for that which he already holds from the State, or be deprived of its enjoyment. The cases would be analogous if the State should require every merchant in the State after he had his license paid for, authorizing him to exercise the privilege for a year, again within the year to be re-licensed to enjoy the same privilege, and forbid him from exercising it during the year without such new license. This would be to sell a party a privilege and then make it go for nothing, and require him to make a new (647) contract in order to its enjoyment. In other words, we think the real question in this case, is, whether the Legislature can arbitrarily revoke the license of any lawyer in the State, deprive him of his granted privilege and means of living by his profession, thus annulling the grant, or whether this grant is a contract binding on the State, and as such irrevocable. We hold the last to be the true state of the case, and that the license is a contract which the State can not impair. (p. 512-514)

Appellant by his question No. 5 raised the question whether the actions and orders of the Supreme Court of Tennessee impaired the obligation of a contract between the State of Tennessee and appellant in violation of the provisions of Article I, Sec. 20 of the state constitution and Article I, Sec. 10 of the United States Constitution.[1]

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[1] Appellee in its statement of Questions Presented overlooked Question 5 and 6 of Appellant's statement.

In the *Ables* and *Cuyahoga County Bar Association* cases of the Sixth Circuit Court of Appeals cited by Respondent-Appellee under its heading III the questions presented in this case were not before the court and were not passed on.

In a footnote under heading III, Respondent-Appellee stated that *Lathrop v. Donohue* "clearly stands for the inherent authority of the judicial branch to supervise attorneys. In *Lathrop* the majority opinion written by Justice Brennan stated:

> ".....Integration of the Bar was effected through an interplay of action by the legislature and the court directed to fashioning a policy for the organization of the legal profession. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed the statute, chapter 315 of the Wisconsin Laws for that year."

In a footnote to the opinion (No. 3) Justice Brennan said:

> In many other States integration was initially accomplished by the combination of legislative and judicial action. (citing several instances)

Appellant says that after a thorough search he has discovered no instance where integration was accomplished by judicial action squarely forbidden by the legislature, which is the case in Tennessee.

"Inherent authority" and "disciplinary jurisdiction" are terms invented by the Tennessee Supreme Court to mask its usurpation of sovereign and omnipotent power claiming supremacy above the state and federal constitutions.

Respectfully submitted,

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